



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 7, 1996

Mr. John A. Riley  
Litigation Support Division  
Texas Natural Resource Conservation  
Commission  
P.O. Box 13087  
Austin, Texas 78711-3087

OR96-1399

Dear Mr. Riley:

You have asked this office to determine if certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40676.

The Texas Natural Resource Conservation Commission (the "commission") received a request for information relating to any facility owned or operated by Safe Tire Disposal Corporation ("Safe Tire"). You state that the commission has made certain information available to the requestor, but seek to withhold the remaining information and assert that this information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. Pursuant to section 552.305 of the Government Code, you also indicate that certain companies that submitted information to the commission may also assert that the information they submitted is excepted from disclosure. The commission has submitted for our review representative samples of the information it seeks to withhold.<sup>1</sup>

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<sup>1</sup>In reaching our conclusion here, we assume that the "representative sample of records submitted to this office is truly representative of the requested records as a whole. *See* Government Code § 552.301(b)(3) (governmental body may submit representative samples of information if voluminous amount of information was requested); *see also* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

The commission claims that certain information is excepted from disclosure under section 552.101 of the Government Code, which protects information that is "confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information made confidential by a specific statute. Section 361.493 provides that:

Information submitted to the commission in accordance with Section 361.477(g) or Section 361.486(a) or (d), and any report generated by the commission based on the information, is confidential and is not subject to disclosure under Chapter 552, Government Code, and the commission shall protect the information accordingly.

Section 361.477(g) concerns agreements between recyclers of shredded scrap tires and end users and states:

Beginning January 1, 1996, the commission may reimburse a processor for shredded scrap tires only if the processor has a binding agreement to deliver the shredded scrap tires to a person to recycle or reuse or to use for energy recover with 180 days after the date of reimbursement. . . .

Subsections (a) and (d) of section 361.486 also concern waste tire recycling and provide:

(a) . . . [O]n and after January 1, 1996, for all new, amended, and renewal processing registration and each existing processor must identify those persons who will accept the processor's shredded tire pieces for recycling or reuse or to use the shredded scrap tires for energy recovery. . . .

(d) On or before January 1, 1994, and on a semiannual basis thereafter, registered processors and storage site owners and operators shall report their recycling, reuse, and energy recovery activities to the commission. The commission by rule shall prescribe the form and other requirements of the report.

The commission has submitted as attachment E a semiannual report submitted to the commission pursuant to section 361.486(d), as well as a purchase order that identifies an end user of shredded scrap tires. We find that the report is confidential under section 361.493 and is therefore excepted from disclosure under section 552.101 of the Government Code. The purchase order is also confidential under these provisions if it was submitted to the commission in accordance with section 361.477(g) or section 361.486(a) or (d) of the Health and Safety Code.

You also assert that certain information in attachments F and G are excepted from disclosure under section 552.103 of the Government Code. Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision Nos. 638 (1996) at 2, 551 (1990) at 4. A governmental body must meet both prongs of this test for information to be excepted under 552.103(a). Open Records Decision No. 638 (1996) at 2.

You state that the information in attachment F is from the commission's "enforcement files" and that the commission is involved in a pending enforcement action with Safe Tire Disposal Corporation ("Safe Tire"). You also assert that audit work papers in attachment G involving Safe Tire's Odessa-Penwell site are the subject of a current dispute regarding certain reimbursements. Based on a review of the documents and on your assertions, we conclude that you have established that litigation is reasonably anticipated and that the information in attachments F and G relate to this anticipated litigation.<sup>2</sup> Therefore, you may withhold this information under section 552.103.

In reaching this conclusion, however, we assume that the opposing party to the litigation has not previously had access to the records at issue. Section 552.103 is intended to protect the litigation interests of a governmental body by forcing parties that are or may be in litigation with a governmental body to obtain information relating to the litigation through the discovery process, if at all. Open Records Decision No. 551 (1990) at 3. The litigation exception was intended to prevent the use of the Open Records Act as a method to avoid discovery rules. *Id.* at 4. Once information has been obtained by all parties to the litigation, through discovery or otherwise, no section 552.103(a) interest exists with respect to that information and that information may not be withheld under this exception. *Id.*; see also Open Records Decision Nos. 454 (1986), 349 (1982), 320 (1982), 288 (1981). If the opposing parties in this litigation have seen or had access to any of the information in these records, the commission may not withhold that information from the requestor pursuant to section 552.103(a). We also note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982), Open Records Decision No. 350 (1982).

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<sup>2</sup>Although in this instance this office was able to obtain sufficient information regarding the nature of the anticipated litigation from the documents at issue, we note that in future requests for decisions from this office, the commission must specifically state and describe the type of enforcement action that is pending or anticipated, including statutory authority for the enforcement action, and should provide this office with a copy of any relevant pleadings that may have been filed, such as a petition. See Open Records Decision No. 638 (1996). The commission must also explain how the requested information relates to the pending or anticipated litigation. See *id.*

The commission asserts that information in attachment H is excepted from disclosure under section 552.107. Section 552.107(1) protects information that reveals client confidences to an attorney, including facts and requests for legal advice, or that reveals the attorney's legal advice. See Open Records Decision No. 574 (1990). Section 552.107(1), however, does not protect purely factual information or information that is not confidential. *Id.* Although the commission failed to identify in its submission to this office the names of the attorneys or clients, or otherwise identify the information that constitutes a confidential attorney-client communication or legal advice, we have marked the information that we were able to determine constitutes legal advice. You may withhold the information that we have marked under 552.107 and must release the remainder.

You also contend that certain requested information is excepted from disclosure under section 552.108. Section 552.108 excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime," and "[a]n internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution." Gov't Code § 552.108; See *Holmes v. Morales*, 39 Tex. Sup. Ct. J. 781, 1996 WL 325601 (June 14, 1996).

You state that the representative samples in attachment I are records of the commission's "Special Investigations" group, which investigates environmental crimes and enforces environmental criminal laws. We therefore conclude that section 552.108 of the Government Code excepts the requested records in attachment I from required public disclosure. You may choose, however, to release all or part of the information that is not otherwise confidential by law. Gov't Code § 552.007.

Section 552.111 excepts from disclosure "only those internal agency communications consisting of advice, recommendations, opinions and other material reflecting the deliberative or policymaking processes of the governmental body at issue." Open Records Decision No. 615 (1993) at 5. This exception is intended to protect advice and opinions given on policy matters and to encourage frank and open discussions within an agency in connection with the agency's decision-making processes. *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 412 (Tex. App.--Austin 1992, no writ) (citing *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.)). This section does not protect facts or written observations of facts. Open Records Decision No. 615 (1993) at 5. We have marked certain information in attachment I containing advice, opinion, or recommendations relating to the policy functions of the commission that you may withhold from public disclosure under section 552.111.

Finally, you state that certain information that was submitted to the commission by third parties was marked confidential by the submitting party. Pursuant to section

552.305, you ask whether the commission may release this information. This office notified these companies of this request for information and solicited arguments regarding whether the information requested is confidential. One of the companies, Safe Tire, responded to our notice and argues that certain information is excepted from disclosure under sections 552.101, 552.103, 552.110, and 552.111 of the Government Code.

We first address Safe Tire's arguments that the information is protected under section 552.110. Section 552.110 excepts from disclosure "[a] trade secret or commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision." The exception is divided into two parts: (1) trade secrets and (2) commercial or financial information. When considering whether information is protected as a trade secret, this office applies the definition and criteria of "trade secret" set forth in section 757 of the Restatement of Torts and adopted by the Texas Supreme Court in *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). Open Records Decision No. 552 (1992).<sup>3</sup> If a governmental body takes no position with regard to the application of the "trade secrets" branch of section 552.110 to requested information, we accept a third party's claim that information is excepted from disclosure if the third party establishes a prima facie case that the information is a trade secret and no one submits an argument that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5.

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<sup>3</sup>The Restatement of Torts provides that a "trade secret" is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex.), *cert. denied*, 358 U.S. 898 (1958). The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are: "(1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and other involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." RESTATEMENT OF TORTS, *supra*; *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

To fall within the second part of section 552.110, the information must be made confidential by a statute or judicial decision. Open Records Decision No. 592 (1991) at 6. In Open Records Decision No. 639 (1996) the Attorney General held that the case of *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), which interprets exemption four of the federal Freedom of Information Act ("FOIA"), was a "judicial decision" for purposes of section 552.110. Consequently, if a governmental body or other entity can meet the test established in *National Parks & Conservation Ass'n*, the information may be withheld from disclosure. To be held confidential under *Nation Parks & Conservation Ass'n*, information must be commercial or financial, obtained from a person, and privileged or confidential. *National Parks & Conservation Ass'n*, 498 F.2d at 766. To succeed with a claim under the commercial or financial information portion of section 552.110, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure. Open Records Decision No. 639 (1996) at 4.

We conclude that Safe Tire has not established a prima facie case that the information at issue is a trade secret, nor has it established that the information is confidential commercial or financial information. Safe Tire's arguments to this office are essentially conclusory statements and do not establish that the information is excepted from disclosure under section 552.110.

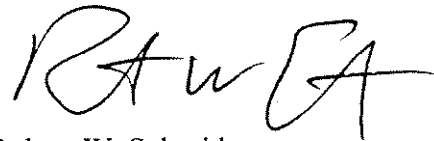
Safe Tire also argues that the information is excepted from disclosure under sections 552.101, 552.103, and 552.111 of the Government Code. To the extent the information submitted by Safe Tire falls within these exceptions as discussed above, the information may be withheld. Thus, for example, information submitted to the commission by Safe Tire in accordance with sections 361.477(g) or 361.486(a) or (d) of the Health and Safety Code, and any report generated by the commission based on the information, is confidential pursuant to section 361.493 of the Health and Safety Code.<sup>4</sup> We note, however, that information that Safe Tire has provided to or received from the commission will not be excepted from disclosure under either sections 552.103 or 552.111. Open Records Decision Nos. 551 (1990) at 4 (section 552.103 may not be claimed if information exchanged with opposing party); 435 (1986) (section 552.111 waived by release of information to third party).

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<sup>4</sup>Safe Tire also asserts that certain information is made confidential by administrative rules of the commission. See 30 T.A.C. §§ 261.10, 330.875. These regulations appear to be cumulative of the confidentiality statutes discussed in this ruling. Moreover, a rule or regulation that provides that information confidential is not valid unless there is specific statutory authority that makes the information confidential. See *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976), cert. denied, 430 U.S. 931 (1977); Open Records Decision No. 594 (1991) at 3.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



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Open Records Division

RWS/rho

Ref.: ID# 40676

Enclosures: Marked documents

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